

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

AARON MCCULLOUGH-BRADSHAW,

Plaintiff,

v.

CITY OF CHICAGO, SERGEANT KENNETH
MESCALL, STAR NUMBER 848, SERGEANT
GEORGE GRANIAS, STAR NUMBER 1731,
JULIO CASTANEDA, STAR NUMBER 17665,
ILIA ACEVEDO, STAR NUMBER 10955,
MARCO CALDERON, STAR NUMBER 14850,
JANET CORTEZ, STAR NUMBER 11573, ERIK
MEJIA, STAR NUMBER 14998, CHARLES
ALVISO, STAR NUMBER 15672,

Defendants.

Case No. 24 C 9015

Judge Kness

**DEFENDANT CITY OF CHICAGO'S MOTION TO DISMISS
COUNT VIII OF THE PLAINTIFF'S COMPLAINT**

EXHIBIT A

**Case No. 22 CV 964, Transcript of Proceedings before the Honorable Steven C. Seeger on
February 22, 2024**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

1
2
3 GISELLE HIGUERA,)
4)
5 Plaintiff,) Case No. 22 CV 964
6 -vs-)
7) Chicago, Illinois
8 CITY OF CHICAGO, *et al.*,) February 22, 2024
9) 9:14 a.m.
10 Defendants.)

TRANSCRIPT OF PROCEEDINGS - Status
BEFORE THE HONORABLE STEVEN C. SEEGER

APPEARANCES:

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16 For Defendant City THE SOTOS LAW FIRM, P.C.
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21 For Defendants Evan JOHNSON & BELL, LTD.
22 Solano and Sammy BY: MR. BRIAN PATRICK GAINER
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1 (Proceedings heard in open court:)

2 THE CLERK: 22 CV 964, Higuera versus City of
3 Chicago, *et al*.

4 THE COURT: Good morning, folks. Good morning,
5 everybody. Good morning.

6 MR. SMITH: Good morning.

7 THE COURT: Let's get everyone's appearances on the
8 record, if you would, please. Start with counsel for the
9 plaintiff.

10 MR. SMITH: Christopher Smith on behalf of the
11 plaintiff.

12 THE COURT: Good morning.

13 MR. GAINER: Good morning, Your Honor.

14 Brian Gainer on behalf of Defendant Solano and
15 Encarnacion.

16 THE COURT: All right. Good morning.

17 MS. ROMELFANGER: Good morning, Your Honor.

18 Allison Romelfanger on behalf of the City of Chicago.

19 THE COURT: All right. Very good.

20 Good morning, folks. Thank you for coming in. It's
21 like the good ole days back in the Dirksen Federal Building.
22 We actually used to show up at the federal courthouse and see
23 a judge, which doesn't happen as much as it used to. I am
24 somewhat mourning the loss of the culture here in the building
25 where we used to get together. I think there were a lot of

1 benefits both for the bench and the bar to get together and
2 talk things over. I think it created a lot of collegiality
3 amongst the bar, and people got to know each other and got to
4 know the judges, and judges got to know the lawyers.

5 And I remember back in the day when the courtroom
6 would be filled. Do you remember those days? The courtroom
7 would be filled and you'd talk to people.

8 MR. GAINER: We were just talking about that actually
9 before you came in.

10 THE COURT: I think there was a cultural loss,
11 actually, to that.

12 So it's nice to see you. Thank you for coming in.

13 I called you in today because I'm going to give you
14 an oral ruling on the motions to dismiss.

15 MR. GAINER: Okay.

16 THE COURT: Let me say this at the outset. I know
17 that you would prefer a written ruling. If I were you, I
18 would prefer a written ruling. I would.

19 But here's the simple reality: I've got -- I don't
20 know -- between 3 and 400 cases. I've got hundreds of pending
21 motions. I cannot write on every motion that's in front of
22 me.

23 It is just faster to write down on a piece of paper
24 what I want to say and then read it, because the proofing
25 process to go from something on my pad of paper to something

1 that I want on Westlaw is more than you might think. It has
2 to have a little bit more spit polish to do that.

3 I am on one of the national committees, and I was
4 talking recently to one of the judges from the SDNY who was
5 saying that it's his practice to routinely do oral rulings,
6 and he really encourages people to do that. So I'm trying to
7 do it I think from time to time when I can in an appropriate
8 case.

9 I know that you may want to be able to read for
10 yourself or for your client or for the record down the road.
11 And that makes perfect sense. You can order the transcript if
12 you'd like. The transcript will be the record.

13 Let me say this as well: I have citations to
14 basically everything that I'm going to say, especially
15 citations to the complaint.

16 If I go ahead and read each of those citations, this
17 is going to be impenetrable. So, especially when I get to the
18 facts, please understand that I've got citations for
19 everything. If there is any particular sentence that you
20 think is unlikely would have had a citation and you want to
21 ask me later "what were you citing," you can do it. But I'm
22 not reinventing the wheel here; I'm just going to be
23 summarizing the allegations of the complaint.

24 So if you'd like, you can take a seat. You might be
25 more comfortable. I'll just read to you what my ruling is

1 going to be.

2 I remember doing this with Judge Shadur, by the way.
3 I used to come in for Judge Shadur, and he would hold court
4 and have me take a seat and he would read longwinded rulings
5 which were undoubtedly more penetrating than what I'm about to
6 do given it was Judge Shadur.

7 But you're welcome to have a seat, and I'll just go
8 ahead and give you my oral ruling. Okay?

9 MS. ROMELFANGER: Thank you, Judge.

10 MR. SMITH: Thank you, Judge.

11 MR. GAINER: Thank you.

12 THE COURT: All right. Thank you, folks.

13 So, again, I'm going to be reading my oral ruling on
14 the motions to dismiss. Thank you for indulging me with the
15 fact that there is an oral ruling.

16 Here it goes.

17 This case stems from a March 2021 fatal shooting by
18 an officer from the Chicago Police Department. Officer Evan
19 Solano fatally shot Anthony Alvarez in the back after a foot
20 pursuit. In the aftermath, Alvarez's estate sued Officer
21 Solano and his partner, Officer Encarnacion. Both officers
22 were involved in the foot pursuit, and the estate also sued
23 the City of Chicago.

24 The estate later -- excuse me. Let me say it again.

25 The estate brought a mix of Fourth Amendment claims

1 and state law claims. The defendant officers moved to dismiss
2 the Fourth Amendment claims. This Court granted the motion in
3 part and denied the motion in part in November of 2022.

4 Later, the estate filed an amended complaint, and
5 then filed a second amended complaint. The second amended
6 complaint is the operative pleading. The second amended
7 complaint set off a second round of motions to dismiss. The
8 defendant officers filed one motion, and the City filed
9 another.

10 For the following reasons, the Court grants in part
11 and denies in part the two motions to dismiss.

12 I'll now turn to the background of the case. Again,
13 I will summarize the allegations of the second amended
14 complaint. I have cites to the second amended complaint for
15 each of the sentences that I'm about to read, but for the sake
16 of speed and readability, I'm not going to read each of the
17 cites into the record.

18 Here it goes.

19 Anthony Alvarez walked through Chicago's Portage Park
20 neighborhood near midnight on March 31st, 2021.

21 Chicago Police Department Officers Evan Solano and
22 Sammy Encarnacion spotted Alvarez from their unmarked SUV.

23 They recognized Alvarez. The night before, the two
24 officers had "followed" him in their vehicle.

25 I'm citing there Paragraph 11.

1 The complaint does not explain why he was followed.

2 Let me turn back to the night in question,
3 March 31st, 2021. The officers saw Alvarez. "There were no
4 warrants" out for his arrest, and there weren't any
5 "investigative alerts to notify officers to stop or speak" to
6 him. I'm quoting Paragraph 14.

7 Alvarez didn't have any criminal convictions, either.
8 But according to the second amended complaint, the officers
9 "agreed to go after him." I'm quoting Paragraph 13.

10 The officers "did not activate their body-worn
11 cameras." But they hit the gas and "drove their vehicle
12 straight at" Alvarez. I'm quoting Paragraphs 17 and 21.
13 Alvarez started running to "avoid being struck." I'm quoting
14 Paragraphs 18 to 19.

15 At some point, the officers jumped out of their car.
16 Again, the second amended complaint alleges that they "did not
17 activate their body-worn cameras." I'm quoting Paragraph 25.

18 A foot chase ensued.

19 Officer Encarnacion exited the car first and started
20 chasing Alvarez. Officer Solano then trailed behind.

21 Officer Solano did not bring up the rear for long.
22 He overtook Officer Encarnacion.

23 Once leading the charge, Officer Solano ran down the
24 alley and turned onto the 5200 block of West Eddy Street. He
25 spotted Alvarez who had lost his footing. According to the

1 second amended complaint, Officer Solano "immediately fired
2 several shots." I'm quoting Paragraph 32. The bullets struck
3 Alvarez in his back and in his leg. He died from the wounds.

4 Giselle Higuera is the administrator of Alvarez's
5 estate. She filed this lawsuit. She named Officer Solano,
6 Officer Encarnacion, and the City of Chicago as defendants.

7 Some of the complaint's claims invoked Section 1983.
8 The estate alleged that both officers violated the Fourth
9 Amendment when they used excessive force. The estate also
10 alleged that the officers violated the Fourth Amendment when
11 they failed to intervene in each other's conduct.

12 The estate also brought a Fourth Amendment *Mone*⁷⁷
13 claim against the City of Chicago. The estate offered two
14 theories. First, the estate alleged that the City's
15 "problematic history of deadly foot chases and related
16 excessive force" caused the underlying constitutional
17 violations.

18 The complaint referenced a 2017 report from the U.S.
19 Department of Justice. According to the complaint, the
20 Department of Justice "found that the CPD's pattern and
21 practice of unreasonable force included shooting at fleeing
22 suspects who presented no immediate threat."

23 The complaint continued. It noted that the Illinois
24 Attorney General filed a federal lawsuit against the City of
25 Chicago in 2017. That lawsuit culminated in a 2019 consent

1 decree. Under the decree, an independent monitor provides
2 periodic updates to the -- excuse me -- periodic updates on
3 the department's progress.

4 You can see the consent decree in Case No. 17 CV
5 6260. It's referred to in the complaint at Paragraph 39,
6 meaning the complaint in front of me, 22 CV 964.

7 According to the complaint in the case in front of
8 me, the independent monitor's third report covered the
9 March 1, 2020, to December 31st, 2020, period. That period is
10 not much after Officer Solano killed Alvarez in March 2021.
11 The report revealed that the "percentage of foot pursuits
12 ending in some level of force . . . increased by 6.1 percent"
13 compared to an earlier reporting period. I'm quoting there
14 Paragraph 40.

15 As the complaint puts it, the report reflected that
16 the City "failed to reach full compliance in developing a
17 supplemental foot training bulletin that reflects best
18 practices from foot pursuit policies in other jurisdictions."
19 I'm quoting there Paragraph 40.

20 In sum, the complaint alleged that the Chicago Police
21 Department "did not have a foot pursuit policy and/or the
22 training necessary to implement an appropriate policy" when
23 Officer Solano killed Alvarez. I'm quoting Paragraph 41.

24 The estate's second *Moneill* theory shifted focus away
25 from the department's missing foot pursuit policy. The

1 estate's second theory alleged that the City's "failure to
2 supervise and discipline has led to a police culture of
3 impunity." I'm quoting there Paragraphs 46 to 68. That's the
4 section that talks about the second theory.

5 Once again, the estate referred to the Department of
6 Justice's 2017 report. According to the complaint, the report
7 found that the City had "systemic deficiencies" including the
8 "failure to review and investigate officer use of force." I'm
9 quoting there Paragraph 54.

10 The failure "helped create a culture in which
11 officers expect to use force and not be questioned about the
12 need for or propriety of that use." I'm quoting there
13 Paragraph 54.

14 In other words, the complaint described an "endemic
15 attitude" among CPD officers that "they may engage in
16 excessive force against the citizenry with impunity and
17 without fear of official consequence." I'm quoting there
18 Paragraph 59.

19 The estate also brought a variety of state law claims
20 above and beyond the Fourth Amendment claims.

21 The Court will discuss those claims down the road.

22 In response, the defendant officers filed a motion to
23 dismiss. They challenged the Fourth Amendment claims.

24 This Court issued a decision in writing on that
25 motion to dismiss on November 30th, 2022. The Court granted

1 the motion in part and denied the motion in part. It's in the
2 docket at Docket No. 61.

3 First, the Court dismissed the estate's Fourth
4 Amendment excessive force claims against the officer
5 defendants to the extent that the claims relied on the foot
6 chase and the vehicle pursuit.

7 The Court explained that a Fourth Amendment excessive
8 force claim requires a seizure. That's what the text of the
9 Fourth Amendment says, after all. And a "seizure requires
10 physical contact, or submission to a lawful command to stop."
11 I'm quoting Page 2 of my order, Docket No. 61. The order is
12 dated, again, November 30th, 2022.

13 But the original complaint did not allege that the
14 officers' vehicle made "physical contact" with Alvarez. And
15 the complaint did not allege that Alvarez submitted to the
16 officers' authority during the chase. So the estate didn't
17 allege that the officers seized Alvarez during the run or
18 during the drive-up to him in the vehicle.

19 It actually happened chronologically different. So
20 let me say that the other way.

21 The estate didn't allege that the officers seized
22 Alvarez when the vehicle approached him, and the estate also
23 didn't allege that the officers seized Alvarez when they ran
24 after him. Approaching him in a vehicle isn't a seizure, and
25 running after somebody isn't a seizure if they don't submit to

1 your authority.

2 On the other hand, the complaint did allege an
3 excessive force claim against Officer Solano based on another
4 theory. Officer Solano seized Alvarez when the bullets
5 pierced him. That's a physical contact.

6 The shooting theory did not hold up against Officer
7 Encarnacion. After all, the complaint didn't allege that
8 Officer Encarnacion fired his weapon. So, the Court dismissed
9 the Fourth Amendment excessive force claim against Defendant
10 Encarnacion altogether.

11 Then the Court turned to the Fourth Amendment failure
12 to intervene claims. The Court held that the complaint
13 plausibly alleged a claim against Officer Encarnacion, but the
14 complaint dismissed the failure to intervene claim against
15 Officer Solano, meaning the officer who fired the weapon. The
16 complaint did not allege that Officer Encarnacion violated the
17 Constitution except by failing to intervene.

18 So the complaint didn't allege that Officer Solano
19 violated his duty to intervene and stop an unconstitutional
20 act by Officer Encarnacion. If the complaint didn't allege
21 that Officer Encarnacion violated the Constitution, then the
22 complaint couldn't allege that Officer Solano failed to
23 intervene to prevent a constitutional violation by Officer
24 Encarnacion. In other words, there was no constitutional
25 violation to prevent.

1 You cannot fail to intervene to prevent a
2 constitutional violation when there was no constitutional
3 violation. That's the concept.

4 So, the lay of the land was as follows. After the
5 original motion to dismiss, the original complaint, this Court
6 concluded that the complaint stated an excessive force claim
7 against Officer Solano based on the shooting. The complaint
8 also stated a failure to intervene claim against Officer
9 Encarnacion based on his alleged failure to prevent the
10 shooting, but the Court dismissed all other excessive force
11 theories.

12 Since then, the estate filed a second amended
13 complaint. As an aside, the estate labeled the document as
14 the first amended complaint, but by the look of things, it
15 looks like it's the second amended complaint. So I'll be
16 referring to that as the second amended complaint because
17 that's what it looks to be despite what the caption may say.
18 I think you all know which one I'm referring to. It's Docket
19 No. 80. The sealed version is Docket No. 81.

20 The second amended complaint is similar to the
21 original complaint in many respects. It's not identical, but
22 it is similar. Just like the original filing, the complaint
23 invokes Section 1983. It also brings a *Mone*ll claim against
24 the City. The *Mone*ll theories are the same as the first time
25 around. The second amended complaint alleges that the City

1 doesn't have a foot chase policy that is sufficient and that
2 the City fails to discipline its officers.

3 The second amended complaint included a few new
4 factual allegations. I'll start with the factual allegations
5 that involve the policies and practices of the City.

6 According to the second amended complaint, Officer
7 Encarnacion gave an interview after the shooting. Again,
8 Officer Encarnacion isn't the shooter. Officer Encarnacion is
9 the shooter's partner. The shooter is Officer Solano.

10 According to the second amended complaint, Officer
11 Encarnacion described the lack of training during that
12 interview. The second amended complaint alleges that, after
13 the shooting, Officer Encarnacion "stated that he has not
14 received any real foot pursuit training, and that he regarded
15 the CPD training bulletin to constitute suggestions and
16 recommendations." I'm quoting there Paragraph 46.

17 And Officer Solano "claimed that his review of the
18 training bulletin regarding foot chase policy caused him to
19 deviate from what he thought was the safest course of action."
20 I'm quoting Paragraph 43.

21 In other words, the complaint alleged that both
22 officers "claimed that they received no meaningful training as
23 to how to conduct a foot chase." I'm quoting there
24 Paragraph 39.

25 The complaint added a few new facts to bolster its

1 failure to discipline theory as well.

2 According to the complaint, the "Defendant Officers
3 believed that they could stop individuals and/or conduct
4 interviews without reporting or documenting it as a police
5 action, double hyphen, no body camera and no reporting."

6 I added the word "and" there for readability in
7 brackets. I'm quoting there Paragraph 53 of the complaint.

8 The second amended complaint continues. "After
9 killing Anthony Alvarez, neither Officer Solano nor
10 Encarnacion were required to describe the shooting, the number
11 of shots fired, nor whether there were any bystanders or
12 witnesses. CPD is so busy making sure its officers are
13 protected from consequences in a shooting, that they do not
14 even ask questions related to immediate public
15 safety" -- excuse me -- "related to immediate public and
16 police safety." I'm quoting Paragraph 76.

17 I'll now describe a few new factual allegations
18 against the two officers. The complaint renewed the Fourth
19 Amendment excessive force and failure to intervene claims
20 against both defendant officers. Take a look at
21 Paragraphs 132 to 137.

22 The factual allegations supporting those claims are
23 largely the same, but two new facts emerged. The new facts
24 are about whether Officer Encarnacion had bullets and fired
25 his gun.

1 "According to the publicly released investigation
2 file," Officer Encarnacion "told his supervisor" that he
3 "fired his gun." *Id.* at Paragraph 28. A later inspection of
4 Officer Encarnacion's firearm revealed that one bullet was
5 "unaccounted for" after the shooting. *Id.* at Paragraph 28 and
6 29.

7 The state law claims appeared in the second amended
8 complaint, too. Some of the state law claims are against the
9 defendant officers. Others are against the City, including a
10 wrongful death and a survival claim.

11 The second amended complaint set off a second round
12 of motions to dismiss. The officer defendants filed a renewed
13 motion to dismiss, and the City did, too.

14 So I'll now turn to the motions at hand.

15 That's a basic overview of the facts of the case as
16 alleged in the second amended complaint.

17 I'll start with the standard for the motions to
18 dismiss. You all know the standard for the motions -- for
19 motions to dismiss like the back of your hand. Let me just
20 give you a quick summary. I'm going to spare you a reading of
21 the citations to the case law.

22 A motion to dismiss under 12(b)(6) challenges the
23 sufficiency of the complaint, not its merits. When
24 considering a Rule 12(b)(6) motion to dismiss, the Court
25 accepts as true all well-pleaded facts in the complaint and

1 draws all reasonable inferences from those facts in the
2 plaintiff's favor.

3 To survive a Rule 12(b)(6) motion, the complaint must
4 provide the defendant with fair notice of the basis for the
5 claim, and it must be facially plausible. A claim has facial
6 plausibility when the plaintiff pleads factual content that
7 allows the Court to draw the reasonable inference that the
8 defendant is liable for the conduct alleged.

9 So that's a summary of the allegations of the facts
10 in the second amended complaint, and it's a summary of the
11 legal standard.

12 I will now turn to my analysis of the claims. I'm
13 going to start with the claims against the defendant officers.
14 I'll then tackle the claims against the City.

15 I'll start with the excessive force claims against
16 the two officers.

17 The officer defendants argue that the estate's second
18 amended complaint suffers from the same flaws as the earlier
19 complaint. In other words, the defendant officers think that
20 the estate's second amended complaint tries to hook them with
21 theories this Court had already cut loose.

22 The defendant officers have a point.

23 I'm first going to address the claim about the
24 approach by the vehicle and the foot pursuit.

25 The second amended complaint echoes a theory that

1 this court already dismissed. The second amended complaint
2 alleges an excessive force claim against both officers based
3 on the "aggressive stop/foot pursuit." I'm quoting
4 Paragraph 133 of the second amended complaint.

5 The estate does not point to any new facts that would
6 support a different outcome. Instead, the estate simply
7 argues that this Court got things wrong the first time around.

8 An amended complaint is not a chance for a plaintiff
9 to serve up the same facts and same claims and same theories
10 in the hopes that the Court will dish out a different result.
11 An amended complaint is an opportunity to patch holes that
12 sunk the original complaint.

13 Here, the estate did not plug any holes. The estate
14 has not come forward with any new facts that would change this
15 Court's conclusion.

16 For example, the estate does not allege that the
17 vehicle struck Alvarez. The estate does not allege that the
18 officers touched or otherwise seized Alvarez during the foot
19 pursuit except when the firearm was fired. The estate does
20 not allege that Alvarez submitted to the authority of the
21 officers during the foot pursuit. Actually, it alleges the
22 opposite, that he didn't. He was running.

23 The estate also does not cite any new case law. If
24 there was new case law from the Seventh Circuit, I would
25 obviously consider it closely. If there was new case law from

1 another judge in this district, I would consider it closely.
2 I don't see any new facts, I don't see any new law, so I don't
3 see any reason to change my conclusion.

4 Maybe the estate thought that it needed to raise the
5 same claims a second time to preserve them. If so, I don't
6 fault you for doing that. I didn't like waiving things as a
7 lawyer, and maybe they did that out of a sense of
8 self-preservation. If so, that's perfectly fine. I don't
9 fault you. But I'm just going to reach the same conclusion
10 that I already reached. I dismissed the claims before and I'm
11 going to dismiss the claims again.

12 The excessive force claims are dismissed against the
13 officers to the extent that the estate is claiming Fourth
14 Amendment excessive force claims against the officers based on
15 the approach of the vehicle and based on the foot chase.

16 The approach of the vehicle is not a seizure, the
17 foot race is not a seizure for the reasons that I've already
18 explained in my last ruling and again today. There was no
19 seizure, so there was no Fourth Amendment violation, so
20 there's no claim.

21 So, again, I am dismissing the Fourth Amendment
22 claims against the officers to the extent that they involve
23 the approach of the vehicle and to the extent that they
24 involve the foot pursuit.

25 This portion of the ruling does not cover the

1 excessive force claim about the shooting itself, meaning the
2 penetration of the bullet into the person's body.

3 Next, I'm going to turn to the excessive force about
4 the shooting itself.

5 The estate frankly doesn't have much work to do to
6 keep the claim alive against Officer Solano. The claim isn't
7 going anywhere. The Court sees no reason to revisit its
8 earlier ruling.

9 The bottom line is that the complaint alleges that
10 the officer in question, Officer Solano, acted with excessive
11 force when he shot Alvarez. That's enough to state an
12 excessive force claim in broad strokes.

13 So once again, I'm going to conclude that the estate
14 does state an excessive force claim against Officer Solano for
15 the shooting. That's enough to survive a motion to dismiss.

16 The estate also attempts to revive the claim against
17 Officer Encarnacion. The estate appears to want to revive its
18 theory based on the new allegations in the second amended
19 complaint.

20 In other words, the second amended complaint adds new
21 facts, a couple new facts, and based on those new facts, the
22 second amended complaint wants to bring an excessive force
23 claim against Officer Encarnacion himself.

24 Here are the new facts.

25 The first new fact is that Officer Encarnacion told

1 his supervisor that he fired his gun. That's at Paragraph 28
2 of the second amended complaint. The second fact is that the
3 magazine in Officer Encarnacion's gun was missing one bullet
4 after the shooting. That's Paragraph 29.

5 Here's the rub. The second amended complaint does
6 not allege that Officer Encarnacion shot at Alvarez. The
7 second amended complaint doesn't allege that one of Officer
8 Encarnacion's bullets hit Alvarez. The gap matters.

9 A Fourth Amendment seizure can take "the form of
10 physical force or a show of authority that in some way
11 restrains the liberty of the person." See *Hess v. Garcia*, 72
12 F.4th 753 at 763, Seventh Circuit 2023.

13 Physical force can be a seizure, but the complaint
14 does not allege that Officer Encarnacion used physical force
15 against Alvarez.

16 Let me say that again.

17 The second amended complaint does not allege that
18 Officer Encarnacion used physical force against Alvarez. The
19 second amended complaint does not allege that Officer
20 Encarnacion fired a bullet that hit Alvarez. The second
21 amended complaint does not allege that Officer Encarnacion
22 applied physical force to Alvarez's body.

23 The other option for a seizure under the Fourth
24 Amendment is submission to a show of authority. But the
25 complaint doesn't allege that Alvarez submitted to authority.

1 Instead, it alleges the opposite. It alleges there was a foot
2 chase.

3 The complaint alleges that Alvarez kept running until
4 Officer Solano shot him. In other words, Alvarez never
5 voluntarily submitted to Officer Encarnacion's show of
6 authority because he was running away. He kept going until
7 Officer Solano stopped him.

8 In sum, the complaint once again does not allege that
9 Officer Encarnacion seized Alvarez. So the complaint doesn't
10 state an excessive force claim against Officer Encarnacion.

11 Let me put this part of the ruling for you in plain
12 English.

13 The second amended complaint says that Officer
14 Encarnacion fired his weapon. It also alleges that he was
15 missing a bullet, or at least that's how you could read
16 Paragraphs 28 and 29. That's something, but it's not enough
17 to get you there.

18 It doesn't allege that the gun was fired by Officer
19 Encarnacion at Alvarez. In other words, I don't think it
20 alleges that Officer Encarnacion pulled out his weapon and
21 fired a shot at Alvarez. It doesn't allege that a bullet from
22 Officer Encarnacion's gun hit Alvarez. The second amended
23 complaint doesn't allege that Officer Encarnacion fired a shot
24 at Alvarez and missed but Alvarez was so concerned by that
25 that he submitted to the officer's authority and stopped in

1 his tracks. None of that is in there.

2 It simply alleges that a gun was fired at some point
3 in time and that a bullet is missing. It doesn't say when the
4 gun was fired. It doesn't say when the bullet went missing.

5 If the estate wants to allege that Officer
6 Encarnacion shot Alvarez, then it can do so, but it doesn't.

7 Let me clarify what I just said.

8 I said that they can allege that if they want, but
9 what I really meant is you can allege that if you think it is
10 actually true within the spirit of Rule 11, obviously. That
11 goes without saying. And don't take that the wrong way.
12 Don't take that the wrong way.

13 After watching the videos, I have some level of
14 concern about any allegation that Officer Encarnacion shot at
15 Alvarez. But you know the case better than I do, and it's up
16 to you to plead the complaint. It's not up to me to plead it.
17 Maybe there is something out there that I'm missing. Maybe
18 the video doesn't show the whole thing. I don't know.

19 But all I know is what I see in the second amended
20 complaint. That's what I've got. And I've got a complaint
21 here that alleges that there was a missing bullet. And there
22 is a complaint here that he fired the gun at some point.
23 That's not enough to allege a seizure. You'd have to either
24 show a physical force or a submission of authority. Neither
25 one is alleged here. So, I'm going to once again conclude

1 that Officer Encarnacion does not have to face the excessive
2 force claim.

3 It's a long way of saying this: As currently
4 alleged, the second amended complaint does not state an
5 excessive force claim against Officer Encarnacion because it
6 does not allege an act of physical force against Alvarez and
7 does not allege that he applied authority that restrained the
8 liberty of Alvarez. That's the ruling.

9 I'm now going to turn to the Fourth Amendment claim
10 about failure to intervene against the officers.

11 To state a failure to intervene claim, a plaintiff
12 must plausibly allege that a defendant "(1) knew that a
13 constitutional violation was committed; and (2) had a
14 realistic opportunity to prevent it." See *Gill v. City of*
15 *Milwaukee*, 850 F.3d 335, 342, Seventh Circuit 2017.

16 I'm going to start with Officer Solano. Again, he is
17 the officer who shot Alvarez.

18 During the first motion to dismiss stage of the case,
19 this Court dismissed the failure to intervene claim against
20 Officer Solano. The Court explained that the original
21 complaint didn't allege that Officer Encarnacion committed a
22 constitutional violation. The only exception obviously was
23 the allegation that Officer Encarnacion failed to intervene in
24 the alleged violation by Officer Solano when he fired his
25 weapon.

1 Put that aside.

2 The fact that Officer Encarnacion did not commit a
3 freestanding constitutional violation doomed the failure to
4 intervene claim against Officer Solano. There is no failure
5 to intervene claim against Officer Solano when there is no
6 underlying constitutional violation by Officer Encarnacion.

7 An officer cannot be liable for failing to intervene
8 in a constitutional violation by another officer when there is
9 no constitutional violation by the other officer.

10 Things haven't changed. The second amended complaint
11 does not allege an excessive force claim against Officer
12 Encarnacion. So, the second amended complaint does not
13 plausibly allege that Officer Solano violated any duty to
14 intervene.

15 Let me put that a little bit differently.

16 The second amended complaint does not allege that
17 Officer Solano failed to intervene to prevent a violation by
18 Officer Encarnacion because the complaint doesn't allege a
19 violation by Officer Encarnacion. If there is no excessive
20 force claim against Officer Encarnacion, then, by definition,
21 there is no failure to intervene claim against Officer Solano
22 to prevent an excessive force claim -- excuse me -- violation
23 by Officer -- I'm going to say that again.

24 If there is no excessive force claim against Officer
25 Encarnacion, then, by definition, there is no failure to

1 intervene claim against Officer Solano to prevent an excessive
2 force violation by Officer Encarnacion.

3 I hope I got the names straight there that second
4 time around. I think you know what I mean.

5 If one officer didn't commit a constitutional
6 violation, then the other officer could not be liable under a
7 failure to intervene theory for a failure to prevent the
8 constitutional violation. If there is no constitutional
9 violation, then there is no claim for failing to prevent a
10 constitutional violation. There is nothing to prevent.
11 That's the concept. There is nothing to prevent.

12 So, once again the Court dismisses the failure to
13 intervene claim against Officer Solano because there is no
14 underlying violation by Officer Encarnacion.

15 I'm now going to turn to the failure to intervene
16 claim against Officer Encarnacion.

17 In its previous order, the Court let the claim
18 against Officer Encarnacion go forward. The Court explained
19 that the critical question was whether Officer Encarnacion had
20 a realistic opportunity to intervene. The Court concluded
21 that question was best answered during discovery.

22 Officer Encarnacion thinks that the question can be
23 answered right here, right now. According to Officer
24 Encarnacion, the factual landscape has changed since the first
25 motion to dismiss. As he sees things, the now-publicly

1 available body-cam footage resolves the issue, so there is no
2 need to go down discovery lane.

3 This court watched the body-cam footage. I watched
4 the footage from both cameras. The cameras captured footage
5 taken by each officer during and after the foot chase. The
6 footage shows the two officers chasing Alvarez. It shows a
7 heat-of-the-moment, fast-developing, heart-pounding foot
8 chase.

9 The footage shows the two officers running down the
10 alley. It shows one officers ahead of the other officer and
11 then they swapped. One officer is a little faster than the
12 other. I think Officer Solano got there first. He sped ahead
13 of Officer Encarnacion.

14 They were running down the alley. They turned right.
15 Officer Solano turned right. The footage shows Officer Solano
16 shoot Alvarez. It happened awfully quickly, but you can see
17 Officer Solano with his gun. You can see Alvarez lying on the
18 ground, unfortunately. The footage also shows Encarnacion
19 arriving on the scene a few seconds later when Alvarez was
20 already on the ground.

21 Officer Encarnacion argues that the body-cam footage
22 shows that the shooting started and ended in a flash,
23 literally and figuratively. According to him, the whole thing
24 was over in about a second.

25 So Officer Encarnacion says that the videos prove

1 that he didn't have a realistic chance to get in the middle of
2 things.

3 Before I get into the merits of that, I need to talk
4 about a threshold question. The question is whether this
5 Court can consider the videos at the motion to dismiss stage
6 at all. That's the antecedent question.

7 In other words, I've got an argument in front of me
8 about the body-cam footage. So I have to think to myself, can
9 I even consider that.

10 On a motion to dismiss, Courts generally stick close
11 to the pleadings, as they're required to do. They don't stray
12 very far. Courts are not in the business of diving into the
13 record which does not exist, after all.

14 Instead focus -- Courts focus on the complaint. They
15 see if the complaint gives the defendant fair notice about
16 what the complaint is about.

17 Sometimes Courts do consider extrinsic evidence at
18 the motion to dismiss stage, meaning material that is outside
19 the statements in the complaint itself. For example, Courts
20 may consider "documents incorporated into the complaint by
21 reference, and matters of which a court may take judicial
22 notice." See *Smykla v. Molinaroli*, 85 F.4th 1228 at
23 Page 1235, Seventh Circuit 2023.

24 Under the incorporation by reference doctrine, "if a
25 plaintiff mentions a document in his complaint, the defendant

1 may then submit the document to the court without converting
2 defendant's 12(b)(6) motion to a motion for summary judgment."
3 I'm quoting *Brownmark Films, LLC, v. Comedy Partners*, 682 F.3d
4 687, 690, Seventh Circuit 2012.

5 "The doctrine prevents a plaintiff from evading
6 dismissal under Rule 12(b)(6) simply by failing to attach to
7 his complaint a document that proves his claim has no merit."
8 *Id.*

9 The doctrine is a narrow exception, as the Seventh
10 Circuit pointed out in the *Levenstein* case, 164 F.3d at
11 Page 347. It does not "grant litigants license to ignore the
12 distinction between motions to dismiss and motions for summary
13 judgment." *Id.*

14 Indeed, if a district court strays too far from the
15 path and considers extrinsic material, it can spring Rule
16 12(d) into life. In that case, the Court must treat the
17 motion as a motion for summary judgment and give all parties
18 an opportunity to present the material that they want to
19 present. That's what Rule 12(d) says.

20 In sum, an exhibit that goes outside the pleadings
21 can only -- let me say that again.

22 In sum, a Court can consider a document that is
23 outside the pleadings, but only in narrow circumstances.
24 Typically, it's a document that is referenced in the complaint
25 and is central to the complaint or sometimes it involves

1 material that's outside the complaint that the Court can take
2 judicial notice of. That's the concept.

3 If the complaint itself references a document and
4 it's central to the claim and "incontrovertibly contradicts"
5 the complaint, the exhibit will control the motion to dismiss.
6 That's what the Seventh Circuit in the *Bogie* case, 705 F.3d at
7 609.

8 Judge Kness gave a helpful summary of the law, as he
9 often does, when addressing this issue in the *Flores* case.
10 Judge Kness summarized the law about body-cam footage at the
11 motion to dismiss stage. Take a look at *Flores Delgado v.*
12 *City of Chicago*, 547 F.Supp.3d 824 at Page 831, Northern
13 District of Illinois 2021.

14 Let me read just you a paragraph from Judge Kness's
15 opinion because I think he captured it well.

16 "At this stage, the Court reviews the complaint and
17 all exhibits attached to the complaint. In doing so, the
18 Court accepts the plaintiff's allegations as true and
19 construes all inferences in the plaintiff's favor. But the
20 Court is free to consider any fact set forth in the complaint
21 that undermine the plaintiff's claim. This distinction
22 includes exhibits attached to the complaint such as video
23 recordings attached to or referenced in a complaint.
24 Accordingly, when a video attached to or referred to in a
25 complaint clearly contradicts the plaintiff's allegation, the

1 video controls."

2 Justice Scalia had a nice line on this a couple of
3 years ago, incidentally.

4 So the first question I have to consider is whether
5 the second amended complaint refers to the body-cam footage.
6 That question is a little bit tricky. At first glance, the
7 complaint seems to imply that the body-cam footage does not
8 exist even though I think we all know it does exist. Right?

9 The complaint alleges that the officer defendants
10 "did not activate their body-worn cameras while they were
11 driving." I'm quoting there the second amended complaint,
12 Paragraph 21, also Paragraph 25.

13 So there's not much of a foothold in the complaint
14 for the second -- in the complaint about the body-cam footage.
15 The estate's response brief does tighten its position. The
16 estate acknowledges that the footage does exist. According to
17 the estate, the complaint "did not imply that there was no
18 police camera footage of this incident. There obviously is."
19 I'm quoting the Page 9, Footnote 2, Docket No. 8.

20 The estate went on to explain its stance. "What
21 defendants did, contrary to their training and CPD policy, was
22 delay activating their body cameras."

23 At this point, the estate explains, it can't say
24 whether the delay was "intentional."

25 So there was just a little bit in the second amended

1 complaint about the body-cam footage. In the response brief,
2 the estate acknowledged that the videos existed but says there
3 may have been an issue about when they were turned on.

4 In other words, the estate acknowledges that the
5 body-cam footage exists. But the question is not whether the
6 videos exist. The Court can see for itself that the videos
7 exist. The question is not whether this estate admits that
8 they exist. The estate obviously admits that they exist.

9 The question for me is whether the second amended
10 complaint itself points to the body-cam footage. That's what
11 I have to decide. And here, there really just is not that
12 much of a foothold. There is an inkling, but there's not
13 really much of a foothold to stand on in the second amended
14 complaint about the body-cam footage.

15 At the end of the day, even if the complaint did
16 reference the videos, I cannot say at this point that the
17 videos are central to the estate's claim. The reality is that
18 the videos are evidence of what happened, but it's not
19 immediately clear to this Court at this early stage that the
20 videos are central to the claim.

21 Central -- the word "central" does not simply mean
22 important. It typically means that it's the whole shebang.
23 For example, the Seventh Circuit has said "the usual example"
24 of an exhibit that is central to a claim is a contract in a
25 breach of contract case.

1 So a document that is central to the claim means
2 something more than an important piece of evidence. That's
3 how I read the Seventh Circuit's opinion in the case of
4 *Tierney v. Vahle*, 304 F.3d 734 at 738, Seventh Circuit 2002.

5 The videos don't seem to satisfy that standard. The
6 Court has no doubt that the videos "will provide key insights"
7 into what went down and how it went down. I'm quoting the
8 *Brown* case, 8 -- excuse me -- 594 F.Supp.3d 1021 at 1030,
9 Northern District of Illinois 2022.

10 But the videos at this early stage don't stand alone
11 "dispositive of the facts at issue." That's another way of
12 saying that the videos are part of the story, but it remains
13 to be seen what I haven't seen.

14 After all, the estate's theory is that the defendant
15 officers deliberately delayed turning on their body-cam
16 footage. It is conceivable that what happened before the tape
17 started rolling might become relevant. I'm not frankly sure.
18 This Court is leery of short-circuiting the fact-gathering
19 process. The complaint does do enough to put Officer
20 Encarnacion on notice. So with some reluctance, I'm going to
21 say that even though I have watched the body-cam footage, I am
22 not going to say at this point that the body-cam footage is
23 enough at the motion to dismiss stage to knock out the failure
24 to intervene claim against Officer Encarnacion.

25 But let me say this: I watched the videos

1 personally. I have a hard time seeing how the estate can
2 bring a failure to intervene claim against Officer Encarnacion
3 based on the shooting by Officer Solano.

4 Here's what I see: There was a foot chase. The
5 videos showed that Officer Encarnacion was in the lead first,
6 but apparently Officer Solano is faster or maybe he's got more
7 endurance. I don't know. He got there first. Officer Solano
8 sped ahead. He ran past Officer Encarnacion as they ran down
9 the alley. Officer Solano and Officer Encarnacion ran down
10 the alley chasing Alvarez. Officer Solano sped. He ran
11 faster. He ran by Officer Encarnacion. Officer Solano turned
12 a corner, he turned right, and that's when he shot Officer
13 Alvarez [sic]. It happened quickly. Officer Encarnacion
14 arrived a few seconds later.

15 Based on what I saw, it is hard to see how Officer
16 Encarnacion could have intervened and prevented the shooting.
17 The reality is that he was running and he got to the scene
18 second. Officer Solano got there first. Officer Encarnacion
19 got there second.

20 When Officer Encarnacion turned the corner, the
21 shooting had already taken place. That's what I see.

22 I don't see how Officer Encarnacion could have
23 intervened and saved Alvarez, candidly. I don't know.

24 That being said, I don't know what I don't know.
25 Maybe there are other facts out there that affect the

1 analysis. I'm going to keep my powder dry. I'm going to keep
2 an open mind. I've seen the videos, but I think it's a bit
3 premature for me to say just based on these videos that
4 there's no way that the plaintiff can have a claim. At least
5 I'm not going to do that at the motion to dismiss stage.
6 Maybe I will do that at the summary judgment stage, but I'm
7 not going to prevent you from getting discovery on this.
8 That's the idea.

9 The failure to intervene claim against Officer
10 Encarnacion might not survive summary judgment. But based on
11 what the Court has seen, it looks like a steep climb. But
12 today is not the time for the climb. It will come later.

13 Please understand, everyone, what I'm saying and what
14 I'm not saying. I'm not at this point saying that the claim
15 is going to succeed or is going to fail at summary judgment.
16 I have some doubts. I have concerns. I have some questions.
17 But I don't have a ruling on that for you other than the
18 ruling on the motion to dismiss.

19 My job now is not whether any jury could side in
20 favor of the plaintiff. That's not my ruling.

21 The question for me is just whether the second
22 amended complaint does enough. And I'm presented with a
23 second amended complaint that barely mentions the body-cam
24 footage. And after watching the body-cam footage, I think
25 there's enough there to allow discovery to go forward on that

1 claim.

2 At the end of the day, the failure to intervene claim
3 against Officer Encarnacion might not survive, but that's not
4 a question for today.

5 So don't anyone get too excited or too disappointed.
6 I'm just keeping my powder dry. We'll see how it shakes out.

7 It's a long way of saying this: Officer
8 Encarnacion's motion to dismiss the failure to intervene claim
9 against him is denied.

10 I've now addressed the motions to dismiss filed by
11 the officers.

12 I'm now going to turn to the motion to dismiss filed
13 by the City of Chicago.

14 I'll start with the *Mone11* claims.

15 Everyone is all too familiar with *Mone11*. For a
16 "*Mone11* claim to survive a motion to dismiss, a plaintiff must
17 plead facts that plausibly suggest that, quote, she was
18 deprived of a constitutional right" -- "(1) she was deprived
19 of a constitutional right; (2) that deprivation can be traced
20 to some municipal action (*i.e.*, a policy or custom), such that
21 the challenged conduct is properly attributable to the
22 municipality itself; (3) the policy or custom demonstrates
23 municipal fault, *i.e.*, deliberate indifference; and (4) the
24 municipal action was the moving force behind the
25 federal-rights violation." I'm quoting there *Thomas v. Neenah*

1 *Joint School District*, 74 F.4th 521, 524, Seventh Circuit
2 2023.

3 The Seventh Circuit has delineated three different
4 types of actions that might support a municipal -- might
5 support municipal liability. You folks know the standard.
6 Let me point you to *First Midwest Bank Guardian of Estate of*
7 *LaPorta v. City of Chicago*, 988 F.3d 978, 986, Seventh Circuit
8 2021.

9 Let me summarize the three types of actions.

10 First, a municipality might be liable if it has an
11 "express policy that caused a constitutional deprivation when
12 enforced."

13 Second, a municipality could be on the hook for "a
14 widespread practice that is so permanent and well-settled that
15 it constitutes a custom or practice."

16 Third, a municipality might be responsible when the
17 "constitutional injury was caused by a person with final
18 policy-making authority."

19 Even so, *Moneill* cannot be turned into a form of
20 *respondeat superior* liability. *Moneill* is not *respondeat*
21 *superior* liability. To avoid turning *Moneill* into *respondeat*
22 *superior* liability, it is important to "distinguish between
23 the isolated wrongdoing of one or a few rogue employees and
24 other, more widespread practices." *Howell v. Wexford Health*
25 *Sources*, 987 F.3d 647, 654, Seventh Circuit 2021.

1 The estate brings the second type of a *Mone*ll claim,
2 meaning a claim about a widespread practice. It argues that
3 the City's lack of a foot chase policy led to a widespread
4 practice of problematic foot pursuits.

5 I'm going to start with that, the missing foot chase
6 policy. That's what I'll call it. So I'll start with the
7 foot chase policy, and then I'll talk about the failure to
8 discipline.

9 So here it goes with respect to the foot chase
10 policy.

11 The City attacks the estate's theory about the lack
12 of a policy about foot chases. The City contends that the
13 second amended complaint has not alleged municipal fault.
14 Again, as you know, municipal fault is the third part of a
15 *Mone*ll claim. In other words, a complaint must allege that
16 the policy or custom demonstrates municipal fault, *i.e.*,
17 deliberate indifference.

18 The City argues that the complaint's deliberate
19 indifference allegations are implausible. Let me talk about
20 the standard for deliberate indifference.

21 "Deliberate indifference is a stringent standard of
22 fault." See *Connick v. Thompson*, 563 U.S. 51 at Page 61,
23 Supreme Court 2011. It's not an inadvertent oversight or a
24 momentary lapse or a fleeting slip-up or a goof or a gaff or a
25 mistake or a whoops. Instead, deliberate indifference

1 requires "proof that a municipal actor disregarded a known or
2 obvious consequence of his action." I'm quoting there again
3 the *Connick* case.

4 In other words, a municipality shows deliberate
5 indifference when it, quote -- excuse me. I said "quote." I
6 didn't mean "quote."

7 Let me say that again.

8 In other words, a municipality shows deliberate
9 indifference when it, number one, fails to provide adequate
10 training in light of foreseeable consequences; or, two, fails
11 to act in response to repeated complaints of constitutional
12 violations by its officers. See *Miranda v. County of Lake*,
13 900 F.3d 335, 345, Seventh Circuit 2018.

14 The City argues that it didn't fail to do anything.
15 According to the City, it didn't sit on its hands. In its
16 view, the City took active steps to address foot pursuits. To
17 support its argument, the City offers excerpts from the
18 independent monitor's reports. Again, remember, the
19 independent monitor provides periodic updates about the City's
20 progress under a consent decree.

21 According to the City, it has received glowing report
22 cards. The independent monitor "commended CPD for making
23 considerable progress toward tracking and analyzing the
24 frequency of foot pursuits." I'm quoting there Page 6 of the
25 City's brief, Docket No. 87.

1 So the City seeks dismissal based on the independent
2 monitor's report. The City believes that it's fair game to
3 consider the independent monitor report under a theory of
4 incorporation by reference. They point this out at Page 3 of
5 their brief, Footnote 5.

6 Again, as a refresher, the incorporation of a
7 reference doctrine comes into play when a document is
8 referenced in the complaint and is central to the claim. So
9 this has to do again with the antecedent question of whether I
10 consider -- can consider something that's outside the four
11 corners of the complaint.

12 Here, the first prong looks to be satisfied. The
13 estate's complaint mentions the independent monitor's report.
14 Take a look at Page 100 and 101.

15 But at this early stage, the Court doubts that the
16 report is central to the claim. It doesn't appear that the
17 monitor's report is akin to a contract on a claim for a breach
18 of contract. But even if this Court were to consider the
19 report, this Court cannot definitively declare at the motion
20 to dismiss stage that the report "incontrovertibly
21 contradicts" the complaint's allegations. See *Bogie*, 705 F.3d
22 at 609.

23 That's a difficult standard to meet. The concept is
24 whether it torpedos the claim indisputably, whether it sinks
25 it, whether it's doomed to fail. It's sort of like whether

1 the complaint defeats itself, whether it's self-defeating by
2 embedding a hand grenade in itself, so to speak.

3 The complaint offers a less rosy picture of the
4 independent monitor report than the picture that is painted by
5 the City.

6 The second amended complaint alleges that the
7 independent monitor report concludes that the City "failed to
8 reach full compliance in developing a supplemental foot
9 pursuit training bulletin that reflects best practices from
10 foot pursuit policies in other jurisdictions." I'm quoting
11 there Paragraph 101 of the second amended complaint.

12 The complaint also alleges that Officer Solano and
13 Officer Encarnacion "claimed they received no meaningful
14 training as to how to conduct a foot chase." I'm quoting
15 there Paragraph 39 of the second amended complaint.

16 Here's the bottom line: The Court declines the
17 invitation at the motion to dismiss stage to parse the content
18 of the independent monitor report.

19 The defense team has pointed to the independent
20 monitor report saying that it's progress. The complaint says
21 that the existence of progress is not enough because the City
22 has not yet arrived. It is difficult for me to sort that out
23 at the motion to dismiss. I need to hear more.

24 Maybe the defense will prevail on summary judgment on
25 this point, and maybe they won't. I don't know.

1 I am reluctant at the motion to dismiss stage to say
2 that the portions cited by the City in their report are
3 sufficient to doom the claim from the get-go. So it's a
4 limited ruling.

5 For now, at this early stage, the second amended
6 complaint does enough to put the ball in play when it comes to
7 the foot chase policy. So the motion to dismiss, that portion
8 of the motion -- of the *Moneill* claim is denied.

9 There is one more *Moneill* theory that's on the table.
10 The estate theorizes that the City's "failure to supervise and
11 discipline has led to a police culture of impunity." I'm
12 quoting there Paragraphs 107 to 131 of the second amended
13 complaint.

14 The City argues that the estate failed to plausibly
15 allege a widespread practice. To recap, a city can be held
16 liable under Section 1983 for a "common practice that is so
17 widespread and well-settled that it constitutes a custom or
18 usage with the force of law even though it's not authorized by
19 written law or express policy."

20 Only a widespread practice counts. A practice must
21 infect "a critical mass of an institutional body." The
22 practice must be a pandemic. It's not just one sick person.
23 It's sick people. Widespread.

24 That's a metaphor.

25 "The Seventh Circuit has not adopted any bright-line

1 rules defining custom or practice, but it has found that" a
2 practice requires "more than one instance." See *Black v. City*
3 *of Chicago*, 2022 WL 425586 at Page 5, Northern District of
4 Illinois 2022.

5 I was citing there *Thomas v. Cook County Sheriff's*
6 *Department*, 604 F.3d 292 at 303, Seventh Circuit 2010.

7 "The other incidents need to be sufficiently similar
8 to support an inference of a broader pattern."

9 "The greater the dissimilarity, the greater the
10 skepticism that there is a single actionable municipal
11 practice or custom."

12 Here, the estate offers a second amended complaint
13 with some examples. The estate's second amended complaint
14 points to two specific instances of an alleged failure to
15 discipline. The estate alleges that "Officer Solano still had
16 his gun and badge months after he shot Alvarez." Take a look
17 at Paragraph 127 of the complaint.

18 According to the complaint, Officer Solano "pulled
19 his gun on another motorist during a road rage incident."

20 The estate also focuses on Officer Encarnacion.
21 According to the complaint, Officer Encarnacion "has long been
22 known as a dangerous and loose cannon, yet he was still a City
23 employee when Anthony Alvarez was killed." I'm quoting there
24 Paragraph 128.

25 Those are examples, but those are only examples. Let

1 me remind you of the standard.

2 The standard is a widespread practice. I kind of
3 like the pandemic metaphor, which I just came up with on the
4 fly here. It's not just one or two sick people. It's like we
5 need a widespread sickness.

6 You've got to look beyond what's right in front of
7 your nose.

8 Beyond the two specific instances, meaning the two
9 officers in question, Officer Solano and Officer Encarnacion,
10 the second amended complaint does offer more, but not a lot
11 more. The second amended complaint goes back in time and
12 points to an almost decade's old statement by an old mayor.
13 The complaint says that in December of 2015, "Chicago Mayor
14 Rahm Emanuel acknowledged the existence of this Code of
15 Silence within the Chicago Police Department." That's
16 Paragraph 112 of the second amended complaint.

17 The complaint also points to a report from the
18 Department of Justice in 2017. The report found that the
19 Chicago Police Department failed to "review and investigate
20 officer use of force," which "helped create a culture in which
21 officers expect to use force and not be questioned about the
22 need for or propriety of that use." That's Paragraph 115.

23 Basically, when it comes to the allegation about
24 discipline, the second amended complaint does not bring very
25 much to the table. The estate alleges that the two officers

1 didn't receive discipline. That's something, but that's not
2 enough. That isn't enough to establish a widespread practice.

3 Beyond that, the estate points to one statement by a
4 mayor a couple of mayors ago. Mayor Emanuel is no longer
5 Mayor Emanuel. He is Ambassador Emanuel. He is in Japan
6 right now representing his country.

7 That's a statement from 2015. It is now 2024.
8 That's nine years ago. There's been a lot of water under the
9 bridge, literally and figuratively.

10 Apart from the isolated statement by a couple of
11 mayors ago, almost a decade ago, the second amended complaint
12 points to a DOJ report from 2017. The incident in question
13 took place in 2021, four years later. Four years. That's a
14 span of time equal to a presidential term. A lot of time has
15 passed between 2017 and 2021. To bridge the gap, a plaintiff
16 must allege factual content to give rise to a reasonable
17 inference that problems then were problems now. And when I
18 mean now, I mean now at the time of the second amended
19 complaint.

20 The more time that passes, the more facts that a
21 complaint must muster to give rise to a plausible inference.
22 Facts about the past can only get you so far.

23 Here, the second amended complaint doesn't really do
24 it. The second amended complaint points to the DOJ report
25 from 2017, as many complaints in this building do.

1 I have concerns about the life span of the DOJ report
2 from 2017. At some point it can't be good enough just to cite
3 the DOJ report from 2017. What I think happens in this
4 courthouse is people roll into the courthouse with a complaint
5 that invokes the DOJ report from 2017, and they think that
6 gets over the *Mone11* hump.

7 As I see things, the more time that passes, the more
8 you've got to add to get over the hump. The hump gets bigger.
9 It's like the Rocky Mountains. It's rising with the time.

10 If it's enough to simply cite the 2017 report from
11 the Department of Justice, a *Mone11* claim would be near
12 automatic. It would be the standard way of doing things. It
13 would be just almost automatic in every case against the City.
14 The prohibition on vicarious liability would be out the
15 window, basically.

16 Here's what I'm trying to say: At some point, it
17 can't just be good enough to cite the 2017 DOJ report. We're
18 now in 2024. The events here took place in 2021. To get over
19 the hump of *Mone11*, a plaintiff has to allege that there was a
20 widespread practice. I don't think it's enough just to cite
21 the DOJ report from 2017.

22 The allegations of the complaint when it comes to a
23 widespread practice about lack of discipline are too general,
24 they're too vague, they're too old. There's not a lot there.
25 It made me think frankly, who won the Super Bowl in 2017?

1 Anybody know? What was best picture? Anybody know? World
2 Series, anybody?

3 That was two years after the Blackhawks last won the
4 Stanley Cup. That, I remember.

5 I bet there's nobody on the Chicago Bears right now
6 who was on the Chicago Bears in 2017. Who was the coach of
7 the Chicago Bulls in 2017? Does anybody know? I have no
8 idea.

9 Who was the best player on the Cubs or the White Sox
10 in 2017? Anybody know? I couldn't tell you in 2021, and I've
11 been trying to pay attention to these things.

12 Here's the point: The more time that passes, the
13 more stale things get. The more time that passes, the weaker
14 the inference about old material.

15 To get over the hump from *Mone11*, I do think that the
16 complaint here needs to allege more facts about a widespread
17 practice about a failure to discipline.

18 I'm not saying that a complaint couldn't do it. I'm
19 simply saying that the second amended complaint hasn't done
20 it. In my view, the second amended complaint does not do
21 enough to state a claim under *Mone11* about a widespread
22 practice for a lack of discipline. So the *Mone11* claim about
23 the lack of discipline is dismissed.

24 Finally, I'm going to turn to the state law claims.
25 The City asked the Court to dismiss the estate's claims under

1 the Illinois Wrongful Death Act and the Survival Act.

2 Specifically, the City argues that it's immune from
3 liability under the Illinois Tort Immunity Act.

4 The estate responded. Candidly, the estate's
5 response was difficult to parse. I mean that in the nicest
6 possible way. Please take it in that spirit. I was not a
7 hundred percent sure what the position was, candidly.

8 The estate explains that it "agrees that
9 Section 2-201 immunizes Defendant from acts and omissions in
10 determining policy under Illinois law as to Illinois state law
11 claims. Plaintiff's policy claim is her Section 1983 *Mone*¹¹
12 liability claim. Plaintiff at this time is not aware of my
13 any ministerial failures by the City of Chicago. However,
14 Plaintiff can examine how City policy affected Defendants in
15 the Complaint for Counts in addition to *Mone*¹¹." I'm quoting
16 there the plaintiff's response brief at Page 15.

17 Candidly, I'm not a hundred percent sure what that
18 means. I'm interpreting the estate's response to concede that
19 it has not alleged a claim under the Wrongful Death Act or the
20 Survival Act against the City. I frankly don't know how else
21 to read the estate's response. After all, the estate labels
22 its paragraph with the header "Plaintiff has not brought state
23 law policy claims." So that's the header.

24 If I am misunderstanding your position, I'll give you
25 leave to amend. I will. But as I see things, I'm going to

1 grant the City's motion to dismiss the Illinois Wrongful Death
2 Act claim and the Survival Act claims against the City.

3 In other words, I'm just going based on what I see
4 here and as I understand your position. If I'm missing
5 something, file a motion, ask for leave to amend and I'll give
6 it to you. Okay? I really will.

7 So here's the conclusion, folks: I'm going to grant
8 in part and deny in part the motions to dismiss. The
9 excessive force claim against Officer Solano obviously
10 survives. For now, the Fourth Amendment failure to intervene
11 claim against Officer Encarnacion survives as well. The
12 Fourth Amendment claims are otherwise dismissed, meaning the
13 claims about the approach of the vehicle and about the foot
14 chase.

15 The City's motion to dismiss is granted in part and
16 denied in part. The *Moneill* claim can go forward in part. The
17 *Moneill* claim can go forward as to the claim about the foot
18 chase policy. The *Moneill* claim is not going forward as
19 alleged about the lack of discipline for officers generally.

20 I'm dismissing the claims under state law against the
21 City.

22 So that's the ruling.

23 So, folks, I don't know what's the most sore, your
24 ears, my court reporter's fingers, or my throat. It's
25 probably a three-way tie.

1 Let me say this. Thank you for your patience. I
2 know it's hard to sit there. I know it's hard to sit there
3 and just digest a ruling orally. I'm a visual learner. I
4 like seeing things. It's hard for me to get it in oral format
5 sometimes. So I'm sympathetic if you want a written report.
6 You can order the transcript.

7 I cannot say enough how burdened district courts are
8 in this district. I think that there is, candidly, an
9 information gap between the bench and the bar in terms of how
10 many things are on a district court's plate in this district
11 and how besieged everyone is. I don't think that message is
12 getting out. I think people are working incredibly hard, and
13 I wish I could give you a written ruling, again.

14 I would not be surprised if I give you a ruling some
15 day on something else, but I cannot give you a written ruling
16 on everything. It was just quicker for me to give you this
17 written ruling. If I had to proof it and get it
18 spit-polished, it probably would have taken me an extra day.
19 And when I've got 3 to 400 cases, if I give everybody an extra
20 day, it really adds up. So thank you for indulging me on
21 that.

22 So that's the ruling, everybody. I know there is a
23 lot to digest.

24 Can we talk about discovery? I meant to look at the
25 docket before I came up here. You know, I have a standing

1 order that talks about discovery. I say that a motion to
2 dismiss doesn't put discovery on ice. I candidly didn't
3 double-check to see if I had stayed discovery. I assume I
4 didn't. I don't remember, candidly. So do you want to tell
5 me -- maybe you have it -- I'm being as straight with you as I
6 can. I can't remember if discovery is going forward. I just
7 didn't -- do you guys want to come on up to and talk to me.

8 MR. SMITH: The fact discovery is basically complete.

9 THE COURT: Okay.

10 MR. SMITH: There is one issue that's been out there
11 pending and really deals with 404(b) and 608 witnesses who are
12 not the fact witnesses of this case. That's awaiting a
13 ruling.

14 That -- the experts are affected a little bit by your
15 ruling on the *Mone*11. There probably will be one *Mone*11
16 expert coming from the plaintiff.

17 THE COURT: Okay.

18 MR. SMITH: I think it's really about *Mone*11
19 discovery at this point, scheduling that. Given -- in light
20 of Your Honor's ruling, I think it's much more focused given
21 the fact that it is directly on the foot chase policies and
22 trainings.

23 THE COURT: Did I stay discovery on *Mone*11?

24 MR. SMITH: We did stay it.

25 THE COURT: So that will be unstayed. I typically

1 stay it pending a ruling. So it will be unstayed for -- to
2 the extent that it isn't -- any objection to that, to
3 unstaying discovery?

4 MS. ROMELFANGER: Your Honor --

5 THE COURT: Or do you want to -- I mean, sometimes I
6 -- I've done it differently, actually, as I think about it.

7 Go ahead.

8 MS. ROMELFANGER: So I think we are -- the City is
9 going to plan to file a motion to stay and bifurcate *Moneill*.

10 THE COURT: Yeah.

11 MS. ROMELFANGER: We obviously have to answer the
12 complaint and do that --

13 THE COURT: Right.

14 MS. ROMELFANGER: -- but we do intend to do that,
15 Your Honor.

16 THE COURT: Okay. So why don't we do this. I
17 will -- I will leave the stay in place for now subject to the
18 fact that you all have to digest what I've just ruled, and you
19 should talk it over. If people want to keep it stayed, you
20 can file a motion. If people want to lift to stay, you can
21 file a motion. But I'll give you a chance to talk it over.

22 Is that fair, everybody?

23 You've got to digest things, what you just heard.

24 MS. ROMELFANGER: Yes, Judge.

25 THE COURT: You know, I've done different things in

1 different cases depending on the needs of the case. So I'll
2 give you a chance to soak it up and think it over and talk it
3 through.

4 MR. SMITH: Okay. I can say off the bat, though, we
5 would -- we're going to oppose a stay. We do believe,
6 especially in light of Your Honor's ruling, that bifurcation
7 doesn't make sense and we should go forward on a very limited
8 direct *Mone* discovery path and that's what we should start
9 discussing.

10 I do think that that would -- having a conference and
11 really setting out for Your Honor what that would entail
12 beforehand, before we, you know, set dates and things like
13 that, would be beneficial. We'd like to get too starting that
14 type of conference situation.

15 THE COURT: Okay. Well, I understand all that. Why
16 don't you talk it through. And do you want to file a status
17 report? Do you want to do that? Like, do you want to take a
18 week or ten days or something like that?

19 MR. SMITH: Sure.

20 THE COURT: About a week from Monday; is that good?

21 MS. ROMELFANGER: That works, Judge.

22 THE COURT: Is that okay? Just file a status. Like
23 talk it through. Let me know what you think. And if you all
24 disagree on things, you can put it in there. If you agree on
25 things, that's fine, too.

1 MR. GAINER: Can I add something, Judge?

2 THE COURT: Yeah, you can add whatever you'd like.

3 MR. GAINER: Not *Mone* related --

4 THE COURT: Yeah.

5 MR. GAINER: -- because I represent the individuals.

6 THE COURT: Yeah.

7 MR. GAINER: So Chris mentioned -- counsel mentioned
8 that there are some other 404(b)-related things that are
9 specific to the individual claims that still have to be ironed
10 out.

11 I just want to put that out there that I think your
12 ruling sort of affects those things based on the dismissal of
13 the *Mone* claim related to the failure to supervise and train
14 and whether or not certain things about these officers' past
15 are relevant to anything. I'm not suggesting that we need to
16 argue that now.

17 THE COURT: Yeah.

18 MR. GAINER: I'm just pointing out that I think the
19 status report that you're contemplating probably needs to
20 include something about that, too, so we can figure out where
21 we're going next.

22 THE COURT: Yeah, why don't you talk that through.

23 So I'm going to read you between the lines and guess
24 that maybe the officers have had a few bumps in the road along
25 the way and they've been accused of various things and, you

1 know, the plaintiff thinks that they can use that at trial and
2 you think it's character evidence or propensity evidence and
3 ought not come in.

4 That's what we're talking about?

5 MR. GAINER: That's exactly what we're talking about.

6 THE COURT: That's fine.

7 So talk that through and then let me know if you need
8 to tee it up or if you need a ruling, you know, if you need a
9 briefing schedule, whatever you need.

10 MS. ROMELFANGER: And just so you know, Your Honor,
11 there is a motion to compel regarding that issue that has been
12 fully briefed --

13 THE COURT: Okay.

14 MS. ROMELFANGER: -- by the parties. I think that's
15 what counsel --

16 MR. GAINER: Yeah, I think that's all part of it.

17 THE COURT: Okay.

18 MR. GAINER: I think it's all part of the same thing.

19 THE COURT: Okay. Very good.

20 Okay. Why don't you do this: Why don't you file a
21 status report a week from Monday.

22 Is that enough time, everybody?

23 MR. GAINER: Yes.

24 MS. ROMELFANGER: Yes, Judge.

25 THE COURT: And just see if you can figure out the

1 lay of the land and agree on what you can agree on and let me
2 know what you disagree on and maybe propose a path forward.

3 If -- as I said, I meant to double-check the docket
4 before coming up here, so I didn't see that there was that
5 pending motion, but I'll do that and I'll get you a ruling as
6 quick as I can.

7 MR. SMITH: Thank you, Your Honor.

8 THE COURT: What do you think? Any other --

9 MR. GAINER: Kris Bryant was the best player on the
10 Cubs in 2017.

11 THE COURT: That's probably correct. And my local
12 Cubs fan could tell you that. That's probably -- that was
13 probably not the hardest question I asked today.

14 I -- not to get into the merits here, but I do think
15 that people have gotten a lot of mileage out of the 2017
16 Department of Justice report. Every tire runs out of tread,
17 and I wonder if all of the mileage has gotten out of the 2017
18 DOJ report. I don't know.

19 At some point it's got to have a half-life or a shelf
20 life or a *Mone77* life. And that may have ended. I don't
21 know. I just -- I'm telling you that's how I see things. I
22 think we need -- at some point we need more, and I think that
23 point is now, in my judgment.

24 Okay. So I'll look forward to getting your report.

25 Thank you, again, for sitting with me -- sitting down

1 and bearing with me on the ruling.

2 Anything else you all want to cover today?

3 MR. GAINER: I have nothing. Thank you very much.

4 THE COURT: Okay. Anything from you?

5 MS. ROMELFANGER: Nothing, Judge.

6 THE COURT: Anything?

7 MR. SMITH: Nothing, Judge.

8 THE COURT: I appreciate you folks coming in. I know
9 getting on the suit is a little different than how you've been
10 doing things these days probably.

11 MR. GAINER: You have no idea.

12 THE COURT: Well, I have some idea.

13 I appreciate you making the effort to come down to
14 the Dirksen Federal Building. Nice to see you.

15 MS. ROMELFANGER: Thank you, Judge.

16 (Which were all the proceedings heard.)

17 * * * * *

18 CERTIFICATE

19 I certify that the foregoing is a correct transcript from
20 the record of proceedings in the above-entitled matter.

21

22 /s/ Amy Kleynhans

3/1/2024

23 Amy Kleynhans, CSR, RPR, CRR
24 Official Court Reporter

Date

25